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No. 95-588

In the Supreme Court of the United States

OCTOBER TERM, 1995

REDLAND SOCCER CLUB, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, under Pennsylvania law, a victim of a toxic tort who has made a claim seeking damages for future medical monitoring must establish a need for medical examinations beyond those normally recommended for the general population.

2. Whether the court of appeals correctly affirmed the dismissal of petitioners' medical monitoring claims on the basis of a decision issued while the appeal in this case was pending.

3. Whether the court of appeals correctly held that the district court acted within the scope of its discretion:

(a) when it held that the United States did not waive the "deliberative process privilege" by inadvertently producing five documents; and

(b) when it denied petitioners' motion for class certification.

4. Whether the court of appeals correctly held that petitioners were required to comply with an Army regulation patterned on the regulation upheld in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

5. Whether the court correctly held that, under Pennsylvania law, petitioners could not recover for negligent infliction of emotional distress, because they had failed to allege that they had suffered a physical injury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16a-77a) is reported at 55 F.3d 827. Two opinions of the district court (Pet. App. 82a-104a, 114a-124a) are reported at 835 F. Supp. 803 and 801 F. Supp. 1432, respectively. The other orders and opinions of the district court (Pet. App. 78a, 79a-81a, 105a-109a, 110a-113a, 125a-126a, 127a-141a, 142a-153a, 154a-160a, 161a-171a, 172a-174a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on May 15, 1995. A petition for rehearing was denied on July 13, 1995. Pet. App. 14a. The petition for writ of certiorari was filed on October 10, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Army operates the New Cumberland Army Depot (NCAD), a large supply facility in Fairview Township, Pennsylvania. Pet. App. 82a.[1] For about 40 years, beginning in 1917, the NCAD disposed of various forms of waste in an adjacent 14-acre landfill, known as, Marsh Run Field that was owned by the United States. *Id.* at 82a-83a. In 1976, the United States transferred Marsh Run Field to the township by quitclaim deed. *Id.* at 83a. In 1981, the township began excavating and leveling the site for use as a soccer field. Pet. App. 30a. The Township completed the field in 1982, and petitioner Redland Soccer Club used the field from 1982 until the field was closed in 1987. *Ibid.*

In 1990, petitioners filed this action in United States District Court for the Middle District of Pennsylvania. Petitioners fall into one of three groups: (1) children and adults who used the field for soccer activities; (2) Fairview Township employees who worked at the field; and (3) residents living near the field who used the field. Pet. App. 27a. Petitioners alleged that the United States had negligently disposed of hazardous waste at the landfill and had

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[1] NCAD is now known as Defense Distribution Region East. Pet. App. 82a.

negligently failed to inform the township of the hazardous condition of the land. Petitioners claimed that, as a result of their alleged exposure to hazardous chemicals at Marsh Run Field, they suffered an increased risk of cancer and other diseases. *Id.* at 39a-44a. Petitioners sought monetary damages for medical monitoring and emotional distress under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680. Pet. App 48a.[2] The district court consolidated discovery proceedings in this case with discovery proceedings in *O'Neal* v. *Department of the Army*, 852 F. Supp. 327 (M.D. Pa. 1994), in which residents who lived near the NCAD claimed that their well water had been contaminated by toxic chemicals from the depot. Pet. App. 105a, 110a.[3]

2. Several distinct district court rulings are germane to this petition.

a. The district court denied petitioners' request for class certification. Pet. App. 154a-171a. The court

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[2] Petitioners also sought monetary and injunctive relief under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, and the Pennsylvania Hazardous Sites Cleanup Act (HSCA), 35 Pa. Const. Stat. §§ 6020.101 *et seq.* (1993). Pet. App. 48a. The district court dismissed petitioners' claims under CERCLA and HSCA. Pet. App. 114a-122a, 142a-147a. The court of appeals affirmed the dismissal of petitioners' CERCLA claims and found it unnecessary to address their HSCA claims. Pet App. 60a-63a & n.14. Petitioners have not sought review of those rulings.

[3] In a separate action, several petitioners, who are members of one family (the Elliott family) and who claim to have played soccer at or otherwise used Marsh Field for recreational activity, sought damages for alleged exposure to contaminants emanating from the field. See *Elliott* v. *United States*, No. 1:CV-91-0289 (M.D. Pa). Pet. App. 39a.

also denied petitioners' motion to compel production of documents that the United States had withheld pursuant to the deliberative process privilege, including five documents that the United States inadvertently produced to petitioners. *Id.* at 110a-113a.

b. In January, 1993, the United States moved for summary judgment on petitioners' claims for damages under the FTCA for medical monitoring and emotional distress. On October 19, 1993, the district court entered judgment against petitioners on those claims. Pet. App. 91a-99a. The court noted that the Third Circuit had concluded that, if confronted with the issue, the Pennsylvania Supreme Court would recognize a cause of action under state tort law for medical monitoring. *Id.* at 91a (citing *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 851 (3d Cir. 1990) (*Paoli I*), cert. denied, 499 U.S. 961 (1991)). However, the district court also noted that, under *Paoli I*, to make out such a claim, a plaintiff must establish: (1) that the plaintiff was "significantly exposed" to a proven hazardous substance; (2) that as a proximate result, the plaintiff suffered a significantly increased risk of contracting a serious latent disease; (3) that the increased risk made periodic diagnostic examinations reasonably necessary; and (4) that monitoring procedures existed that made early detection possible and beneficial. *Paoli I*, 916 F.2d at 852. The district court held that petitioners failed to satisfy the first element of the test because they could not adduce facts to demonstrate that they had been exposed to hazardous substances at the surface of the field. Pet. App. 92a-98a. The district court dismissed petitioners' claims for emotional distress because no petitioner had suffered a physical

injury, which under Pennsylvania law is a prerequisite for recovery of such damages. *Id.* at 99a.

c. On November 16, 1993, after the grant of summary judgment for the United States on petitioners' claims, the district court entered an additional discovery order. Pet. App. 79a-81a. The order held that, under an Army regulation, 32 C.F.R. 516.35(d) (the *Touhy* regulation), petitioners' attorneys were forbidden from contacting any current or former NCAD employees to obtain "official information"[4] without first setting forth in writing the nature and relevance of the information sought and seeking the Army's consent to such contact. Pet. App. 80a-81a.[5] The district court declined to rule on petitioners' challenge to the constitutionality of that regulation, noting that, if upon notification the Army were to consent to direct contact between petitioners' attorneys and its employees, a constitutional determination would be unnecessary. *Id.* at 81a. The court noted that the Army had represented that "it does not seek to hamper discovery," but instead to insure compliance with its regulations and to insure "that contacted employees have the opportunity to have Army counsel present with them at any session with Plaintiffs' counsel." *Ibid.*

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[4] Official information is information "acquired by Department [of Defense] personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department." 32 C.F.R. Pt. 516 & App. M.

[5] Such regulations, which are common to federal agencies, are known as "*Touhy* regulations" based on this Court's decision in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), which upheld a similar regulation governing employees of the Department of Justice.

3. The court of appeals affirmed. Pet. App. 16a-77a. In affirming the dismissal of the medical monitoring claims, the court of appeals held that, although petitioners had produced sufficient evidence to indicate that they might have actually been exposed to hazardous substances at the field, they had not produced sufficient evidence to create a material issue of fact on the question whether such exposure was "significant" under *Paoli I*. Pet. App. 55a-58a.

The court of appeals relied on its decision in *In re Paoli Railroad Yard Litigation*, 35 F.3d 717 (3d Cir. 1994) (*Paoli II*), cert. denied, 115 S. Ct. 1253 (1995), which was handed down two months after oral argument in this case. In *Paoli II*, the court of appeals held that a "significant exposure" is an exposure that necessitates "a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure." 35 F.3d at 788, quoting *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 980 (Utah 1993). *Paoli II* concluded that the Pennsylvania Supreme Court would hold, as had the Utah Supreme Court in *Hansen*, that a plaintiff may recover damages based on a medical monitoring claim "only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would have been prescribed for that plaintiff." 35 F.3d at 788, quoting *Hansen*, 858 P.2d at 980. The court of appeals held that, under *Paoli II*, petitioners "failed to introduce evidence that their exposure required a different medical monitoring regimen than that which would normally be recommended for them absent exposure." Pet. App. 58a. The court noted that petitioners' own medical monitoring expert, Dr.

Susan Daum, in recommending a medical monitoring protocol for petitioners, had stated: "I emphasize * * * that the examinations suggested [below] are not out of the ordinary, but consist of the usual adult medical examinations recommended for all adults with the adult risk of cancer in our society. *Ibid.*

In affirming the dismissal of the emotional distress claims, the court of appeals agreed with the district court that no evidence had been presented that any petitioner suffered from a physical injury or medically-identifiable effect from exposure to chemicals at the field. Pet. App. 59a. In cases of negligent infliction of emotional distress in which there is no physical injury, the court of appeals noted, Pennsylvania law does not provide for recovery. *Ibid.* (citing cases).

The court of appeals also summarily rejected petitioners' claims that the district court abused its discretion in denying petitioners' request for class certification, and that the district court had erred in requiring compliance with the Army's *Touhy* regulation. Pet. App. 28a n.2. Finally, the court of appeals held that the district court correctly rejected the claim that the government had waived the deliberative process privilege by inadvertently producing five documents to petitioners' counsel. *Id.* at 75a-76a; *id.* at 29a-30a n.3.

ARGUMENT

1. Petitioners' principal argument (Pet. 11-19) is that the court of appeals erred in requiring that, in a tort action for damages for medical monitoring, a plaintiff must establish that his exposure to toxic materials has necessitated "a monitoring regime different than the one that would have been prescribed

in the absence of that particular exposure." Pet. App. 53a, quoting *Paoli II*, 35 F.3d at 788. In applying that standard, the court of appeals was construing Pennsylvania tort law; it did not address any federal statutory or constitutional issue. See Sup. Ct. R. 10; *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ of certiorari as improvidently granted where legal question "primarily implicates questions of Pennsylvania law and presents no federal question of substance"). Petitioners' suggestion that this Court should intervene to "establish coherent and practical standards to govern toxic tort cases" (Pet. 11) is at odds with the settled principle that, in the absence of a governing federal statute, it is for state statutory and common law, not this Court, to develop standards of tort law. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("[t]here is no federal general common law").

In its decisions in *Paoli I*, *Paoli II* and this case, the Third Circuit made clear that, in announcing the elements of a cause of action for medical monitoring damages, it was applying state law. When the medical monitoring issue first arose in *Paoli I*, the Third Circuit stated:

> Neither the Pennsylvania Supreme Court nor the Pennsylvania Superior Court has decided whether a demonstrated need for medical monitoring creates a valid cause of action. Therefore sitting in diversity, we must predict whether the Pennsylvania Supreme Court would recognize a claim for medical monitoring under the substantive law of Pennsylvania and, if so, what its elements are.

916 F.2d at 849 (footnote omitted), citing *Erie*. In *Paoli II*, the Third Circuit likewise predicted that "the Pennsylvania Supreme Court would set some limits on medical monitoring claims," and accordingly adopted the "special medical monitoring" standard to gauge whether a plaintiff's exposure to a toxic substance was "significant." 35 F.3d at 788. In its decision in this case, the Third Circuit reiterated that it was applying state law, and, in particular, noted that it was predicting how the Pennsylvania Supreme Court would construe the elements of a medical monitoring cause of action. See Pet. App. 52a-53a. In looking to state law in these cases, the Third Circuit acted consistently with the FTCA, which provides that, where a claim is based on the FTCA, the court must determine liability "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).

Even if it were appropriate for this Court to review the correctness of the court of appeals' prediction of how the Pennsylvania Supreme Court would construe the elements of a medical monitoring cause of action, the court of appeals' explication of the "significant exposure" standard was reasonable. As the court of appeals noted, requiring a plaintiff to establish that his exposure to a toxic substance required him to obtain additional medical monitoring merely requires the plaintiff, in the context of the medical monitoring claim, to satisfy the traditional common law requirement that a tort have caused injury. The court of appeals explained:

> The injury requirement is particularly important before a remedy such as medical monitoring is provided because the plaintiff's injury is only an

> increased possibility of harm rather than actual harm. *Paoli II*'s requirement of "special" medical monitoring implicitly recognizes the longstanding requirement in all tort cases other than those based on the old "intentional" common law torts for various forms of trespass that a plaintiff must prove an injury before he may recover anything from a defendant * * * Otherwise, a polluter would become a health care insurer for medical procedures routinely needed to guard persons against some of the ordinary vicissitudes of life. It would convert toxic torts into a form of specialized health insurance. * * *

Pet. App. 55a n.8 (citations omitted). In criticizing the court of appeals for failing to "consider the financial ability of the victims to pay for medical testing" that would be appropriate even absent exposure to toxic substances (Pet. 18), petitioners are effectively seeking "a form of specialized health insurance." Pet. App. 55a n.8.[6] The court of appeals reasonably pre-

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[6] Petitioners claim that the court of appeals has required plaintiffs to prove a need for different "tests" rather than for an expanded "testing regimen" (Pet. 16), and accordingly that that holding would categorically deny plaintiffs damages for x-rays or blood-count testing simply because those tests are used to detect familiar ailments (Pet. 17). Petitioners misapprehend the "special medical monitoring" requirement. The court below made clear that, in its view, Pennsylvania tort law would merely require a plaintiff to establish that his exposure to a toxic substance requires him to undertake a different examination *protocol* from that ordinarily recommended for non-exposed persons, whether or not that protocol includes tests of general applicability like x-rays. The court stated that it was affirming the dismissal of petitioners' medical monitoring claim because petitioners "failed to introduce evidence that their exposure required a different medical monitoring regimen

dicted that the Pennsylvania Supreme Court would not adopt such an expansive remedy.[7]

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than that which would normally be recommended for them absent exposure." Pet. App. 58a.

Petitioners also argue (Pet. 16-17) that the court of appeals improperly broadened the scope of the Utah Supreme Court's decision in *Hansen*, 858 P.2d at 980, by reading *Hansen* to apply beyond the example at issue in that case (in which a person is exposed a second time to a toxic substance to which he had previously been exposed). But the Utah Supreme Court did not limit its decision to that fact pattern, and the logic of *Hansen*—that a person should not be recompensed for the costs of a medical monitoring regime that he should have been undertaking without regard to toxic exposure—applies with equal force in the context of petitioners' claims. In any event, there is no requirement that Pennsylvania calibrate its medical monitoring cause of action to the causes of action of any other State, and any inconsistency between the Pennsylvania and Utah causes of action would therefore present no question warranting this Court's review.

[7] Petitioners claim that the Pennsylvania Superior Court, in which petitioners' state-law environmental claims have been pursued, has "specifically declined to adopt the Third Circuit's decision in this case to the extent that that decision created a requirement concerning different medical testing." Pet. 9-10. The Superior Court's decision (Pet. App. 2a-11a), however, did not address the elements of a medical monitoring claim, but instead addressed the issue of which "response costs" were allowable under Section 6020.702(a)(5) of HSCA, the state environmental statute, a question that the Pennsylvania Supreme Court has also not had occasion to address. Thus, there is no conflict between the decision below and the Superior Court's decision. While the court of appeals expressed the belief that the standard for recovery of medical monitoring under Pennsylvania law would be the same under HSCA and common law tort, see Pet. App. 60a n.12, that statement was dictum. The United States has petitioned the Pennsylvania Supreme Court to review the Superior Court's construction of the HSCA.

2. Petitioners also argue (Pet. 19-23) that the court of appeals erred in dismissing their medical monitoring claims based on a decision (*Paoli II*) that was first issued after argument in this case, without soliciting additional briefing from the parties. It is well established, however, that where no doubt exists about the proper resolution of a legal issue based on the undisputed record, a court of appeals may resolve the issue without affording the parties an additional opportunity to brief it. See *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976), citing *Turner* v. *City of Memphis*, 369 U.S. 350, 353 (1962). Cf. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) (prevailing party may defend judgment on any ground supported by the record).

In the district court, petitioners had addressed the issue of the nature of the medical monitoring that would be needed. As the court of appeals observed, petitioners' own medical monitoring expert, Dr. Susan Daum, "emphasized" that the monitoring examinations that she believed were necessary were "not out of the ordinary, but consist of the usual adult medical examinations recommended for all adults with the adult risk of cancer in our society." Pet. App. 58a. Petitioners neither suggest that the court of appeals misapplied the *Paoli II* standard nor point to any portion of the district court record that could be taken to indicate that petitioners' alleged exposure to toxic substances would have necessitated a medical monitoring regime "different than the one that would have been prescribed in the absence of [the alleged toxic] exposure," *Paoli II*, 35 F.3d at 788 (citation

omitted).[8] Petitioners thus fail to show that the opportunity to submit additional briefs following *Paoli II* might have led the court of appeals to a different outcome.

The cases on which petitioners rely (Pet. 19-20) are consistent with the decision below. Those cases hold that a party must have the opportunity to present evidence on an issue before judgment can be entered against that party on that issue, and that appellate courts accordingly should not resolve issues against a party who lacked such opportunity in the district court. See, *e.g.*, *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941); *FDIC* v. *Laguarta*, 939 F.2d 1231, 1240 (5th Cir. 1991); *Box* v. *A & P Tea Co.*, 772 F.2d 1372, 1376 (7th Cir. 1985), cert. denied, 478 U.S. 1010 (1986); *Charbonnages De France* v. *Smith*, 597 F.2d 406, 416 n.9 (4th Cir. 1979). As we have noted, petitioners had—and availed themselves of—the opportunity in the district court to set out the medical monitoring that their exposure would necessitate. Moreover, the cases cited by petitioner recognize that there are situations in which it is appropriate to resolve an issue not argued on appeal, particularly if (1) that issue was implicit in the issues raised below or fairly embraced within another issue raised on appeal; or (2) the record is adequately developed on that issue. *Hormel*,

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[8] Petitioners claim (Pet. 16) that Dr. Daum recommended "a different regimen, requiring that medical testing start at earlier ages and occur at greater frequency than is recommended for the general population." But petitioners point to nothing in the record that supports that characterization. Dr. Daum merely stated that she regarded it as "more urgent" than in cases of non-exposure that petitioners receive the "usual" adult medical examinations. Pet. App. 58a.

312 U.S. at 556-557 (principle that court of appeals should not rule on questions not resolved below is not "an inflexible practice"); see, *e.g.*, *Box*, 772 F.2d at 1376 (court may consider an issue implicitly included within a defendant's challenge to plaintiff's *prima facie* case); *Laguarta*, 939 F.2d at 1240 n.20.

Finally, petitioners had ample opportunity, after *Paoli II* was issued, to supplement the arguments that they had made to the court of appeals. Oral argument in this case was held on June 22, 1994, and *Paoli II* was decided on August 31, 1994. The decision in this case was not issued until June 15, 1995—nearly nine months after *Paoli II*. Petitioners did not at any point request the opportunity to brief the issue of how *Paoli II* applied to this case. Moreover, petitioners had the opportunity to seek panel rehearing and rehearing en banc of the court of appeals' decision—and they used that opportunity to claim that *Paoli II* had been wrongly applied to bar their claims of medical monitoring. Thus, petitioners cannot claim to have lacked the opportunity to advise the court of appeals of their view of how *Paoli II* applied to this case. In any event, petitioners' claim that the court of appeals erred in not affording them a greater opportunity to be heard on that issue raises no broad question warranting this Court's review.

3. Petitioners also claim that the court of appeals incorrectly held that the district court erred in its discovery-related rulings and in denying class certification. The district court acted within its discretion in making each of those rulings.

a. Petitioners claim (Pet. 23-25) that the district court erred in holding that the United States had not waived the deliberative process privilege when it produced five documents to petitioners. As the court

of appeals noted (Pet. App. 75a-76a), however, the district court analyzed that claim under the proper standard: it inquired whether the United States had "voluntarily" produced any of the five documents, and held that the production had been "inadvertent." *Id.* at 76a; *id.* at 112a, citing *Transamerica Computer Co.* v. *International Business Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978). Petitioners' challenge to that factbound determination does not merit review.

b. Petitioners also argue (Pet. 25-27) that the court of appeals erred in upholding the Army's *Touhy* regulation, under which petitioners were barred from subpoenaing or seeking official information directly from Army employees without first seeking such information from the Army itself. Petitioners claim (Br. 26) that that regulation has the effect of denying them access to material witnesses. Petitioners' claim is unworthy of review for two reasons. First, the record affords no indication that, following the district court's decision, petitioners at any point provided the Army with the information required by the *Touhy* regulation but were prevented from directly contacting Army employees. Thus, petitioners' claim that the Army's regulation has unconstitutionally prevented them from obtaining access to witnesses is premature, and would require this Court to address a constitutional question not passed on below.

Second, petitioners raise no question of broad significance. This Court long ago held, in *Touhy* itself, that the very regulation on which the Army regulation at issue here is patterned was constitutional. See *Touhy*, 340 U.S. at 467-468. In *Touhy*, the Court reasoned that a Department of Justice regulation that prohibited departmental employees from releasing documents on their own and instead

centralized the determination of which governmental files should be released in response to discovery demands advanced a legitimate governmental interest. The Court stated: "When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoena's *duces tecum* will be willingly obeyed or challenged is obvious." 340 U.S. at 468.

Following *Touhy*, the courts of appeals have consistently upheld similar regulations, including where the requested information was in the form of testimony, not documents. See, *e.g.*, *United States* v. *Bizzard*, 674 F.2d 1382, 1387 (11th Cir.) (regulation prohibiting a former Department of Justice employee from testifying as to information acquired during performance of his official duties, without the prior approval of the Attorney General, was constitutional), cert. denied, 459 U.S. 973 (1982); *United States* v. *Allen*, 554 F.2d 398, 406 (10th Cir.) (regulation prohibiting Department of Justice employee from disclosing information or producing material acquired as part of the performance of official duties, without prior approval by the appropriate Department official or the Attorney General, is constitutional), cert. denied, 434 U.S. 836 (1977). See also *Gomez* v. *Gates*, 25 F.3d 761, 764-767 (9th Cir. 1994) (collecting cases upholding the application of *Touhy* regulations in the context of subpoenas seeking testimony by governmental employees), cert. denied, 115 S. Ct. 898 (1995). Petitioners offer no authority casting doubt on the validity of the Army's regulation.

c. Petitioners also contend (Pet. 27-28) that the court of appeals erred in affirming the district court's

denial of class certification. Petitioners argue that certain issues in the case, including liability, could more efficiently be resolved on a classwide basis. However, the district court engaged in the correct inquiry: it asked whether, under Federal Rule of Civil Procedure 23(b)(3), "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3), and held that they did not. See Pet. App. 170a. The district court's opinion on that issue (*id.* at 166a-171a) thoroughly reviewed the relevant factors, and left open the possibility that changed circumstances could justify class certification at a later point. *Id.* at 171a. The court of appeals was therefore correct to hold that the district court's ruling was not an abuse of discretion. *Id.* at 28a n.2.[9]

4. Finally, petitioners argue (Pet. 28-2) that the court of appeals erred in affirming the dismissal of their claims for damages for negligent infliction of emotional distress. The courts below, however, recognized that, under Pennsylvania law, a plaintiff making such a claim must establish that he or she suffered a physical injury, and petitioners failed to do so. Instead, petitioners claimed (Pet. App. 39a-44a) that their exposure to toxic substances heightened their future risk of adverse health consequences. Under Pennsylvania law, however, mere exposure to a toxic substance is not equivalent to physical injury. *Id.* at 59a (citing cases). The courts below correctly applied

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[9] In any event, for a class action to proceed in a case based on the FTCA, each class member must have filed an administrative claim for relief before initiating litigation against the United States. See, *e.g.*, *Pennsylvania* v. *National Ass'n of Flood Insurers*, 520 F.2d 11, 23-24 (3d Cir. 1975). Petitioners have failed to establish that that requirement was met.

Pennsylvania law to the facts at hand, and in so doing implicated no federal question of any importance.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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